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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 41

THE VESSEL "ABBY DODGE," A. KALIMERIS,
CLAIMANT, APPELLANT,

vs.

THE UNITED STATES.

BRIEF OF APPELLANT.

EDWARD R. GUNBY,
Attorney for Appellant.

(21,640.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 210. In Admiralty.

THE VESSEL "ABBY DODGE," A. KALIMERIS, CLAIMANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF OF APPELLANT.

Statement of Case.

On the 6th day of October, 1908, the United States, by its Proctor, filed a libel in the District Court in and for the Southern District of Florida against the vessel *Abbie Dodge*, her boats, tackle, apparel, furniture, and all persons having an interest therein, for the collection of a penalty upon the ground that on the 8th day of September,

1908, there was, at the port of Tarpon Springs, in said district, landed from said vessel 1,229 bunches of sponges, taken by means of diving apparatus from the waters of the Gulf of Mexico and Straits of Florida, said sponges being taken at a time between October 1 and May 1, and subsequent to May 1, 1907, and alleging that the landing of said sponges was in violation of the provisions of the act of Congress of June 20, 1906, and praying for the payment of a penalty and for the forfeiture of said vessel.

Monition and attachment were duly issued and returned thereon.

On the 2d day of November, 1908, A. Kalimeris, who had intervened as claimant, filed his exceptions to said libel. Said exceptions, although stating the grounds in various ways, all being directed to and based upon the alleged unconstitutionality of the said act of June 20, 1906. Subsequently, upon argument of said exceptions, the same was overruled, and the claimant having announced that he decided to stand upon said exceptions, and declining further to plead, judgment was rendered against said vessel and a fine of one hundred dollars and costs imposed against her, said judgment and decree being dated the 20th day of March, 1909. From this judgment the appellant duly appealed and assigned as error:

Assignment of Errors.

First. That the court erred in overruling the exceptions of the claimant to the libel of libellant.

Second. That the court erred in entering a judgment for a fine and costs against said vessel.

ARGUMENT.

As the exceptions to the libel attack the constitutionality of the act under which said libel was filed, the important and only question in the case is: What power under the Federal Constitution had Congress to pass the act of June 20, 1906?

It is a well-settled principle, laid down in Mayberry *vs.* Madison, 1 Cranch, 137, and continuously recognized since that time, that Congress has only the power given to it by the Federal Constitution. The only clause in the Federal Constitution under which the power to pass said act can be claimed is that clause giving Congress the right to "regulate commerce with foreign nations and among the several States."

The act of June 20, 1906, makes it unlawful "to land, deliver, cure or offer for sale, at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or the Straits of Florida: *Provided*, That sponges taken or gathered by such process between October 1 and May 1 of each year, in a greater depth of water than fifty feet, shall not be subject to the provisions of this act."

The allegation of the libel in this case is confined to the charge that there was "landed" from said vessel, *Abbie Dodge*, certain sponges in violation of the provisions of the act, and in discussing the constitutionality of the act, in so far as this case is concerned, the question is whether Congress had the authority to prohibit the landing of an ordinary article of commerce at any port or place in the United States. It will be noted that there is in the act no restriction or limitation whatever limiting the prohibition to the landing of sponges brought into the United States from foreign countries or carried from one State to another (which would necessarily be the essence of interstate or foreign commerce

which Congress had the right to regulate), so that, upon the wording of the act, sponges are prohibited from being landed at any port of the United States, even if taken within the waters of that State, and no element whatever of interstate or foreign commerce is required to enter into the act in order to make it a violation of law.

Granting that the landing of an ordinary article of commerce is commerce within the meaning of the law, it is plain that when commerce is confined within the limits of a single State, Congress has no power to regulate or control it.

The Daniel Ball, 77 U. S., 557.
The Bright Star, Fed. Cases No. 1880.
King *vs.* The American Transportation Co., Fed Cases No. 7787.
United States *vs.* New Bedford Bridge, Fed. Cases No. 15,867.
United States *vs.* James Morrison, Fed. Cases No 15,465.
Sinnot *vs.* Davenport, 63 U. S., 227.

And even if the acts controlled and regulated by the act of Congress are matters of interstate commerce, if the same are so blended with intrastate commerce that the two are inseparable, the act of Congress would be unconstitutional.

In the late case of Howard *vs.* Illinois Central Railroad Company, 207 U. S., 463, the Supreme Court decided that a regulation of intrastate commerce, as well as interstate commerce, and therefore one beyond the power of Congress to enact, is made by the provisions of the employer's liability act of June 11, 1906, and in the body of the opinion the court, in the last paragraph, says: "Concluding as we do that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable

of separation, we are of the opinion that the court below rightly held the statute to be repugnant to the Constitution and non-enforceable."

See also—

Sears *vs.* Warren, 36 Ind., 267.

It requires, however, only a superficial examination of the act of June 20, 1906, to see that the real intent and purpose of that act was not to prohibit the landing, sale, cure or delivery of sponges, but its real purpose was an attempt on the part of Congress to indirectly legislate upon the matter of controlling the taking of sponges from the sponge bars, both within the limits of the State of Florida, and other States bordering on the Gulf of Mexico, as well as the sponge bars under the waters of the high seas.

The courts are not bound by mere forms; they may, and should, look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority, Mugler *vs.* Kansas, 123 U. S., 623, text, page 660, and therefore the real object and purpose of this act can be looked to by the courts to determine whether or not Congress has the authority to pass it. The right to legislate and control the taking and killing of animals *ferea natura,* and the taking of oysters, fish, etc., grows out of the common ownership thereof, by all of the people of the State, and is for the protection and preservation of said property by the people who own it, through their representatives, the law-making power; but when the people of the State are not the owners of such property, they can pass no law looking to its protection or preservation.

The people of the United States, as distinguished from the people of the several States, have no common property in wild animals, oysters, fish, etc., within the boundaries of the several States, which will give them as citizens of the United States the right to legislate for the preservation of such property within the limits of the several States. The

right to legislate on this subject being based upon the common ownership of the property, the several States have this authority when they are erected; but neither the States, nor the United States have this authority over the waters of the high seas outside the limits of the several States.

If there has been no State erected, then this power would remain in the Federal Government until the creation of a State; but the court will take judicial notice of the fact that there is no territory in the United States bordering on the Gulf of Mexico, or the Straits of Florida, except that already admitted to statehood. It will be noted that the act of June 20, 1906, makes no distinction between sponges taken inside the limits of a State, and those taken from the waters of the high seas, and our contention is that, as to those sponges growing within the limits of the State of Florida, or other States, the State only can control them; and as to those growing in the high seas, neither the State nor the Federal Government has any right of control.

To illustrate our contention: Suppose the Federal Government had passed an act prohibiting the landing, delivery or offering for sale, at any port in the United States, of any blue fish, caught by seines in the Atlantic Ocean between October and May. Would it be contended that Congress would have the power to pass such an act? To more sharply draw the contrast: Suppose at the same time the several States bordering on the Atlantic Ocean had laws permitting the catching, landing and sale of fish caught in the manner prohibited by the Federal Government, is it not clear that the State legislation on the subject would be valid, and the congressional legislation invalid?

While there are, so far as we can find, no decisions in relation to the control of the sponge industry and the catching of sponges, their method of growth, and the fact that they, like oysters, are attached to the soil under the water, and there attain their growth and maturity until detached, makes the decisions upon the right of the States to legislate

in regard to oysters so nearly parallel that they would practically control the same rights in regard to sponges. The right of the State to absolutely regulate the oyster industry has been so clearly recognized by this court that it seems no longer open to question.

Lee *vs.* State of New Jersey, 207 U. S., 67.
McReady *vs.* Virginia, 94 U. S., 391.
Louisiana *vs.* Mississippi, 202 U. S., 1.
Smith *vs.* Maryland, 59 U. S., 71.

On the question of the ownership, sovereignty and control, of the tide water and the right to control the fishing therein, this court has frequently recognized the power of the States, and defined the rights of the general Government.

Manchester *vs.* Massachusetts, 139 U. S., 240.
Lawton *vs.* Steel, 152 U. S., 133.
Martin *vs.* Lessee of Waddell, 16 Peters, 367.
Pollard *vs.* Hagan, 3 Howard, 212.
Illinois *vs.* I. C. R. R. Co., 146 U. S., 387.
Wharton *vs.* Wise, 153 U. S., 155.
Mann *vs.* De Coma Land Co., 153 U. S., 273.
McReady *vs.* Virginia, 94 U. S., 391.
Hardin *vs.* Jordon, 140 U. S., 371.
Shively *vs.* Bowlby, 152 U. S., 1.

By the expressed provisions of the act of Congress of March 3, 1845, Florida was "admitted into the Union on equal footing with the original States in all respects whatsoever."

See—

State of Florida *vs.* Black River Phosphate Co., 32 Fla., page 83, text, page 94.

Article One of the Constitution of Florida has defined the boundaries of the State, in the Gulf of Mexico, as being three leagues from shore, and these decisions settle it that the State of Florida has control over the sponge bars and beds in the Gulf of Mexico and Straits of Florida from the

shore out to, and co-extensive with, the State limits so defined.

The case of United States *vs.* Bevans, 3 Wheaton, 336, holds: "The cession of admiralty or maritime jurisdiction to the Federal Government, is not a cession of the water, nor the territory thereunder, within the limits of the State."

In addition to the above-cited decisions of this court on the right of the several States to control the taking of fish and game within the limits of their territory, the following decisions among the State cases are to the same effect:

State of Alabama *vs.* Harred (Ala.), 15 L. R. A., 761.
Waverly *vs.* White (Va.), 45 L. R. A., 227.
People *vs.* Truckee Lumber Co. (Cal.), 39 L. R. A., 581 & note.
Commonwealth *vs.* Hilton (Mass.), 45 L. R. A., 475.
State *vs.* Lewis (Ind.), 20 L. R. A., 52.

See also Greer *vs.* State of Connecticut, 161 U. S., 519, on the power of the State to prohibit the killing of game, and also New York *vs.* Hesterberg, 211 U. S., page 31, on the right of the State, under the Federal Constitution, to control its game laws.

The real power under which the States have authority to pass laws protecting game, fish, oysters, and other things of like character, is practically the police power of the State, and in the Slaughter-house Cases, 83 U. S., 62, this court held that the power of a State, through its police regulations, is supreme, and in State *vs.* K. C., Ft. S. & G. R. R., 32 Fed., 722, it is held that this power in the State, is limited only by the express prohibition in the Federal Constitution. In Mugler *vs.* Kansas, 123 U. S., 123, this police power in the State was expressly recognized and defined, and in the recent case of Keller *vs.* United States, 213 U. S., 138, this court, while recognizing the moral question involved in the case, on page 148 of the text used this language: "There is in the Constitution no grant to Congress of the police power;" and in the case of Holderman *vs.* Thompson (Ind.), 5 N. E.,

175, it is held that the National Congress cannot make police regulations for the protection of the people of the State, and in the body of the decision this clear statement is made: "There is a reserved, and at the same time a well recognized, power affecting their domestic concerns remaining in all of the States, which the Government of the United States cannot, and has seldom attempted to, invade; this reserved power is usually, though perhaps not always accurately, denominated the police power of a State, and embraces the entire system of internal State regulations of public order, intercourse, the prevention of offenses, etc."

These cases, we think, settle the question and decide that the respective States have the exclusive right to control and legislate upon the taking of sponges within their respective territorial limits.

On the question of the power to control the taking of sponges, fish, and oysters outside of the territorial limits of the State or United States we have been unable to find any decisions. The decisions that come closer to deciding the question than any we have found are those in relation to the seal industry in Behring Sea, and in the case of *In re* Cooper, 143 U. S., 474, the court held that the record showed that the seals were killed within the waters of the territory of Alaska, and refused a writ of prohibition. In the case of the North American Commercial Co. *vs.* United States, 171 U. S., 110, involving the contract under which seals were killed, it will be noted that the Government only contracted as to seals killed on the islands in the territory of Alaska, over which it had police power, and did not attempt to give a right or lease to kill on the high seas.

In the cases of La Ninfa and Whitelaw *vs.* United States, decided by the Circuit Court of Appeals of the Ninth Circuit in June, 1896, reported in 21 C. C. A., 434; 75 Fed., 513, the question of the right to control the killing of seals on the high seas seems to have come nearer to being decided than any we can find. In that case the libel charged that the vessel and her crew were engaged in the killing of

seals within the limits of the Alaskan territory and the waters thereof, in violation of the Revised Statutes, the acts of Congress and the proclamation of the President. The District Court of Alaska decreed a forfeiture of the vessel. On an appeal to the Circuit Court of Appeals the facts were examined and the court states: "From these facts the question arises whether Behring Sea at a distance of more than one league from the American shore is Alaskan territory, or in the waters thereof, or within the dominion of the United States in the waters of the Behring Sea." And the court, after discussing the question of the Revised Statutes in connection with the treaty between the United States and Great Britain, says: "It follows therefore that the words 'In the waters thereof,' as used in section 1956, and the words 'Dominion of the United States in the waters of Behring Sea,' in the amendment thereto, must be construed to mean within waters within three miles from the shore of Alaska." The court draws the distinction in that case between the effect of a treaty upon the Government, parties thereto, and their citizens, and a statute which is intended to make an act criminal if committed by a citizen of any country, and in the last paragraph says: "The act was passed enacting certain rules relative to the control of its own subjects in the exercise of the rights which, under the award of the arbitrators, the two countries had in common to *kill seals outside of the three-mile limits*," and the decree of the District Court was reversed with instructions to dismiss the libel.

Under these decisions we respectfully submit that Congress has neither the power to prohibit the landing or sale of an ordinary article of commerce within the limits of a State, nor has it the power to control the taking of sponges, either within the waters of a State or upon the high seas.

Respectfully submitted,

EDWARD R. GUNBY,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE VESSEL "ABBY DODGE," A. KALIMERIS, claimant, appellant.
v.
THE UNITED STATES.
No. 41.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the District Court for the Southern District of Florida overruling appellant's exceptions to a libel filed in said court on behalf of the United States "against the vessel 'Abby Dodge,' her boats, tackle, apparel and furniture, and all persons having any interest therein" (R., 1), and imposing a fine of $100 with

costs against said vessel (R., 7) for violation of the act of June 20, 1906 (34 Stat., 313, ch. 3442), entitled "An act to regulate the landing, delivery, cure, and sale of sponges."

The act is as follows:

> That from and after May first, anno Domini nineteen hundred and seven, it shall be unlawful to land, deliver, cure, or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida: *Provided,* That sponges taken or gathered by such process between October first and May first of each year in a greater depth of water than fifty feet shall not be subject to the provisions of this Act: *And provided further,* That no sponges taken from said waters shall be landed, delivered, cured, or offered for sale at any port or place in the United States of a smaller size than four inches in diameter.
>
> SEC. 2. That every person guilty of a violation of this Act shall for each offense be liable to a fine of not less than one hundred dollars or more than five hundred dollars, which fine shall be a lien against the vessel on which the offense was committed. And every vessel used or employed in violation of this Act shall be liable to a fine of not less than one hundred dollars or more than five hundred dollars or forfeiture, and shall be seized and proceeded against by process of libel in any court having jurisdiction of the offense.

SEC. 3. That any violation of this Act shall be prosecuted in the district court of the United States of the district wherein the offense was committed.

SEC. 4. That it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act, and upon his request the Secretary of the Treasury and the Secretary of the Navy may employ the vessels of the Revenue-Cutter Service and of the Navy, respectively, to that end.

The violation of the act charged in the libel is as follows, viz:

> That there was at the port of Tarpon Springs, within the Southern District of Florida, on the 28th day of September, A. D. 1908, landed from the said vessel "Abby Dodge," one thousand two hundred and twenty-nine bunches of sponges taken by means of diving and diving apparatus from the waters of the Gulf of Mexico and the straits of Florida; that said sponges so taken as aforesaid, were taken at a time other than between October 1st and May 1st of any year, and at a time subsequent to May 1st, A. D. 1907. (R., 1.)

A. Kalimeris appeared to the suit and claimed the vessel as owner. He filed exceptions to the libel because (R., 3, 4):

> First. Because the said libel does not state any case under which the said vessel can be fined or forfeited.
>
> Second. Because the said act of Congress of June 20th, 1906, entitled, "An Act regulat-

ing the landing, delivery, cure and sale of sponges," is not within the powers granted to the United States by the Federal Constitution.

Third. That the said act of June 20th, 1906, is unconstitutional, and cannot be enforced for the following reasons:

1st. Because Congress has no power under the Constitution to legislate against the landing, delivery, cure and sale of sponges in any Port of the United States of America.

2nd. Because said act of June 20th, 1906, is discriminative, and applies only to sponges caught by diving apparatus, and discriminates against any person or vessel that should land, deliver, cure or sell sponges caught in this way.

3rd. Because said act attempts to legislate upon the subject of catching sponges within the waters of the State of Florida, and other States bordering on the Gulf of Mexico, when such power is one of the reserved powers of the States.

4th. Because said act indirectly attempts to prohibit the catching of sponges by diving apparatus within the waters of the several States, and also in the waters of high seas, which prohibition is not within the powers granted to the general government under the Constitution of the United States.

The State of Florida had enacted a law upon the subject of sponge fishing, which is contained in its general statutes and is as follows:

SEC. 3794 (2773). Whoever gathers or catches sponge in and upon any of the

> grounds known as sponging grounds, along the coast of Florida from Pensacola to Cape Florida, by diving either with or without a diving suit or armor, shall be punished by fine not exceeding two thousand dollars, and by confiscation of all diving suits or armor, boats and vessels used in such unlawful gathering of sponge, and in default of payment of such fine, the offender shall be imprisoned not exceeding one year.

There was no evidence offered in the case in any form, but the district court took judicial notice of certain facts relative to sponge fishing, which are thus set forth in the opinion overruling the exceptions (R., 5):

> Along the western coast of Florida there are found submerged reefs, and rocky and so-called "bar bottoms," extending from the shore out many miles into many fathoms of water, upon which grows the sponges, known as "grass," "glove," "boat," "yellow," and "sheeps wool," the latter being the most valuable, but all articles of commerce to a considerable extent. The manner of gathering these sponges, for upwards of fifty years, has been by means of hooks upon long poles, used by a man lying over the bow of a small boat looking through a water glass, by means of which the bottom is clearly seen, and the larger sponges hooked from the bottom. These poles are used sometimes to the length of upwards of sixty-five feet, but the majority or average is about forty-five feet. The growth of sponges differs materially ac-

cording to the character of the bottom; in some places a sponge of the diameter of from eight to ten inches having been known to grow within a space of eighteen months or two years, while in other places the growth is very slow. This business has for many years given occupation to numerous vessels and a large number of men along the west coast of Florida, as many as a thousand or twelve hundred men having been engaged in the business, making a fair livelihood.

Recently there has been introduced a system of gathering these sponges by means of a diving outfit, where the diver with a full diving suit goes down from a boat equipped with an air pump, and remaining many hours under the water, walks through and upon the sponge beds and gathers by hand the sponges of sufficient size.

It is contended, not without reason, that the walking of these divers over the sponge beds with the shoes with heavy lead soles, has had a disastrous effect upon the growth and supply of sponges; that while a few large ones are being gathered, thousands of small ones are killed, until the growth in many places has been nearly exterminated, and there is great danger of the utter destruction of the entire industry.

While, of course, this is a matter solely for the legislative body to consider, and not for the courts, it is adverted to for the purpose of inquiry as to what may have been the object of the act.

When the Senate bill 4806, which became the act of Congress in question, was before the House Committee on Merchant Marine and Fisheries for consideration in April, 1906, testimony was presented to the committee from which it appears that "the water on the west coast of Florida is very shallow. You go out for many miles before you reach a depth of 50 feet. There are places where a depth of 50 feet is not reached until you are 30 or 40 miles offshore." (Testimony of Hugh M. Smith, of the Department of Commerce and Labor.) The records of the Coast and Geodetic Survey confirm this testimony. Mr. A. A. Seraphic, president Sponge Diving Operators' Association, who opposed the bill, testified: "The sponge beds are naturally placed beyond the jurisdiction of the United States. The sponge beds are from 15 to 60 and 65 miles out." He was of opinion that "certainly the United States can not lawfully undertake to forbid diving for sponges in waters beyond the limits of its jurisdiction." The same view is presented by counsel for claimant in this court.

The constitution of Florida, article 1, defines the western boundaries of Florida as running from the Tortugas Islands, "thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido River; thence to the place of beginning."

The argument in support of the exceptions of the claimant made in this court is that the act of Con-

gress involved is unconstitutional, because (1) as to sponges taken within the boundaries of Florida it is an invasion of the reserved rights of the State, and (2) as to sponges taken beyond those boundaries it is not within the powers granted to the General Government by the Constitution of the United States.

PROPOSITIONS AND AUTHORITIES.

I.

Whether the act of Congress in question is unconstitutional as an invasion of the reserved power of the State is a question not presented by this record, inasmuch as it is not shown that any of the sponges landed from the "Abby Dodge" were taken within the boundaries of the State.

Flint v. *Stone Tracy Co.*, 220 U. S., 107–177.

II.

The United States has undoubted right alike in virtue of its power to regulate foreign commerce and as an exercise of its inherent powers of national sovereignty to regulate the use of fisheries near its shores and outside the boundaries of the States, so far as concerns operations by its own people or to or from its own shores.

Lord v. *Steamship Co.*, 102 U. S., 541;

The Chinese Exclusion Case, 130 U. S., 581;

Fong Yue Ting v. *United States*, 149 U. S., 698;

Lem Moon Sing v. *United States*, 158 U. S., 538;

North Am. Commercial Co. v. *United States*, 171 U. S., 110;

Buttfield v. *Stranahan*, 192 U. S., 470;
Oceanic Steam, etc., Co. v. *Stranahan*, 214 U. S., 320.

ARGUMENT.

I.

It is not necessary to consider here whether the boundaries of the State of Florida extend 9 miles from the shore into the Gulf of Mexico or only 3 miles. However this may be, it does not appear from anything in this record, from anything of which the district court took judicial notice, nor from anything disclosed at the hearing before the House Committee, if the facts there shown may be judicially noticed, that a single sponge landed from the *Abby Dodge* was taken within the waters of Florida. It is implied by the exceptions that some of the sponges were taken beyond the limits of Florida; it is consistent with them that all were so taken, and it follows from the testimony of Mr. Seraphic as to the location of the sponge beds that all were taken at a distance of 10 miles or more from the shore. The interesting question, mooted by Mr. Justice Blatchford in *Manchester* v. *Massachusetts* (139 U. S., 240), as to the power of control by the United States over fisheries in the high seas within the jurisdictional limits of a State, does not therefore arise here for determination. It was objected in the *Corporation Tax Case* (220 U. S., 107) that the act of Congress was invalid because it assumed

"to tax foreign corporations, doing local business in a State," but the court answered that, "It is sufficient to say of this that no such case is presented in the record" (p. 177). In like manner the court disposed of the objection that the act was invalid as imposing a tax upon exports.

In the present case, too, the law must be upheld if it is valid as to sponge fisheries beyond the State boundaries. The purpose of the law was plainly to protect the sponge fisheries, and Congress intended to exert its power to the fullest extent permitted by the Constitution. If the terms of the act seem to carry the power beyond those limits, the exercise of the power so far as constitutional is not thereby nullified. This act is separable in its application to sponge fisheries within the jurisdictional limits of the State and those without, and each division of the act can stand alone, and "the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail." (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601, l. c. 636.

II.

The only question possibly open for consideration upon this record is as to the validity of the law as applied to the sponge fisheries beyond the jurisdictional limits of Florida. As to these we submit that the power of the United States is plenary.

Conservation of these fisheries concerns the users of sponges throughout the United States. Florida

certainly can not protect them, and unless the United States does so they may be utterly destroyed.

American fisheries have been regulated by law for more than a century. The act of February 18, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same" (1 Stat., 305, 307, ch. 8), related to deep-sea fisheries. This act was amended by subsequent statutes in respect to bounty and other matters. The laws in force in 1873 when the statutes were revised appear under titles 50 and 51. Section 4321 of the former and section 4391 of the latter are especially pertinent as showing the several fisheries specifically regulated, to wit, whale, mackerel, and cod. Those statutes were construed by the courts in various cases without question as to the power of Congress to enact such laws. (*The Nymph,* 1 Ware, 257, 18 Fed. Cas., 509; *United States* v. *The Paryntha Davis,* 1 Cliff., 532, 27 Fed. Cas., 454; *United States* v. *The Reindeer,* 14 Law Rep., 235, 27 Fed. Cas., 758.)

A later law relating to fisheries (which expired by limitation) is the act of February 28, 1887 (24 Stat., 434, ch. 288), entitled "An act relating to the importing and landing of mackerel caught during the spawning season." This law provided that no mackerel other than Spanish caught between March 1 and June 1 should "be imported into the United States or landed upon its shores," unless "caught with hook and line from boats, and landed

in said boats, or in traps and weirs connected with the shore." The title shows the purpose of the law to be the preservation of these fish during the spawning season. The analogy of that law to the one here in question is evident.

Laws of the same genus are the acts of April 6, 1894 (28 Stat., 52, ch. 57), June 5, 1894 (28 Stat., 85, ch. 91), and December 29, 1897 (30 Stat., 226, ch. 3), for the protection of fur seals in the Pacific Ocean. That legislation goes much further than the act of June 20, 1906, *supra*. Killing, capturing, and hunting at any time or in any manner whatever by any " citizen of the United States," or by any " person owing duty of obedience to the laws or the treaties of the United States," or by " any person belonging to or on board of a vessel of the United States," is forbidden, and violation of the law is presumed in any case where an American vessel is found within the waters with seals or apparatus for taking them. (Act Dec. 29, 1897, secs. 1 and 4.) The law furthermore forbids the importation of fur-seal skins taken by anyone in prohibited waters, and requires the forfeiture and destruction of all that are imported. (Id., sec. 9.)

In *North American Commercial Co.* v. *United States* (171 U. S., 110, 134), Mr. Chief Justice Fuller, speaking for the court, said: " The power to regulate the seal fisheries in the interest of the preservation of the species was a sovereign protective power * * *." The law then under consideration related to seals and other fur-bearing

animals of Alaska and Alaskan waters, but it will be observed the Chief Justice did not refer to the *law* but to the *power* to regulate the seal fisheries. It is, moreover, apparent that the power is not referred to as an incident of ownership, but as an attribute of sovereignty.

A further statute, relating to food products generally, is the act of June 30, 1906 (34 Stat., 768, ch. 3915), entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," and commonly known as the pure-food law. This law forbids, among other things, the introduction into any State or Territory from any other State or Territory, or from any foreign country, of any deleterious foods. In both purpose and effect it relates equally to food fish brought direct from the sea and from foreign ports. For the same reason the one as well as the other must be condemned if unwholesome.

If the foregoing laws are constitutional, surely the one here in question is. The power to regulate commerce in sponges gathered outside the territorial waters of States must be lodged somewhere. It can not be nonexistent. Obviously, it is not in the States; therefore it must be in the Federal Government.

"Commerce," in the grant of power to Congress, comprehends external relations of every nature.

The grant is complete; no residuum was left in the States. The purpose clearly was to empower Congress to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation. (2 Madison Papers, 859.) As was said by this court in *Cooley* v. *Board of Wardens* (12 How., 299, 319) and in *Henderson* v. *Mayor* (92 U. S., 259, 272, 273), " Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

Cases presenting, as here, conditions beyond State control or regulation and involving consideration and application of both constitutional and international law are as follows:

The Chinese Exclusion Case, 130 U. S., 581, 603–609;

Fong Yue Ting v. *United States,* 149 U. S., 698, 711–713;

Lem Moon Sing v. *United States,* 158 U. S., 538, 543;

Turner v. *Williams,* 194 U. S., 279, 290;

Buttfield v. *Stranahan,* 192 U. S., 470, 492, 493;

Oceanic Steam Navigation Co. v. *Stranahan,* 214 U. S., 320, 334, 335;

Lord v. *Steamship Company,* 102 U. S., 541.

All of these cases, except the last, relate to the exclusion of aliens or of merchandise. The two rest upon the same principle, which is the inherent right

of the Nation as a sovereign power to exclude persons and things altogether or to prescribe the terms or conditions upon which they may enter the country.

Turner v. *Williams* and *Buttfield* v. *Stranahan* are representative cases. In *Turner* v. *Williams* alien anarchists were deported under the alien immigration act of 1903. Objection was made that the law was not within any grant of power to Congress. This court, sustaining the defendant, said in part (p. 290):

> Whether rested on the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the act before us is not open to constitutional objection.

In *Buttfield* v. *Stranahan* an act of Congress to prevent the importation of unwholesome tea was declared constitutional. Mr. Justice (now Chief Justice) White, speaking for the court, said (p. 492):

> * * * Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting

from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than 50 years, regulating the degree of strength of drugs, medicines and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. (9 Stat., 237; Rev. Stat., sec. 2933, *et seq.*)

* * * * *

As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public

policy does not violate the due process clause of the Constitution.

If there be any doubt that the power to exclude merchandise altogether, or to prescribe the terms upon which it may enter the United States, attaches to products of the high seas brought directly therefrom as well as to importations in vessels clearing from foreign ports, it is completely removed by the decision of this court in *Lord* v. *Steamship Company,* the last mentioned of the foregoing cases.

The question in that case was whether Congress has power to regulate the liability of owners of vessels navigating the high seas but engaged only in the transportation of goods and passengers between ports and places in the same State. The *Ventura,* a vessel of the United States navigating the Pacific Ocean between San Francisco and San Diego, in the State of California, touching at the intermediate ports on the coast, was held subject to the regulating power of Congress *as engaged in commerce with foreign nations while on the ocean.* Mr. Chief Justice Waite, speaking for the court, said (p. 544):

> The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the *Ventura* went out from San Francisco, or San Diego, on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was

subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. *In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.*

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government.

What was said by this court in another case of the statute construed in that case is applicable here; there is no need to depend alone upon the commerce clause for authority for the law in question. In *Lehigh Valley R. Co.* v. *Pennsylvania* (145 U. S., 192) the matter was declared within the maritime jurisdiction. After quoting a part of the above language of Mr. Chief Justice Waite in

Lord v. *Steamship Company,* Mr. Chief Justice Fuller said in *Lehigh Valley R. Co.* v. *Pennsylvania,* at page 203:

> But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in *In re Garnett* 141 U. S., 1, 12: "The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."

Among the cases examined in *In re Garnett* is the leading case of *The Lottawanna* (21 Wall., 558, 574, 575), in which the sources and extent of the maritime law are considered and summed up as follows:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to

ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The conventional limitation of national authority over the high seas to within 3 miles of the shore

is applicable only as between nations. There is no portion of the habitable globe to which law may not be extended. The high seas, properly speaking, are not beyond the jurisdiction of all nations, but rather within the jurisdiction of them all; the jurisdiction of each nation being limited, indeed, to its own ships or its own people, except as it may be extended by treaty with other nations. In virtue of this undoubted authority piracy and the slave trade are suppressed and crimes of every kind are dealt with in some forum, no matter how far from sight of land they may have been committed. The people of the United States have an interest in sea fisheries, and an especial interest in those near their own shores. Can they do nothing to protect them against methods which waste and exhaust them? Must they perforce open their markets for the free and profitable disposal of the spoils? The United States is asserting nothing here against the sovereignty of any other nation. It does not attempt to exclude the subjects of foreign nations operating from their own shores from fishing in these sponge beds. It simply closes the ports of the United States against everybody engaged in operations which it holds to be needlessly wasteful and destructive in their methods.

There is nothing new in this. It is not new in the legislation of the United States. It is not new in the legislation of other nations. Examples, indeed, are numerous. Russia, Great Britain, New Zealand, Sweden, Norway, Germany, and Holland

have all adopted legislative regulations, applicable to their own subjects, for the protection of seals of various species. Other instances are the British "Sea Fisheries Act" of 1868 (31 and 32 Vict., ch. 45, sec. 47); the Scotch "Herring Fishery Act" of 1889 (52 and 53 Vict., ch. 23); ordinances of Ceylon and statutes of Australasia regulating pearl fisheries; laws of Italy as to coral fishing, and those of Norway establishing a close season for whales. The contention of the United States in the case of the Alaskan seal fisheries was "that any nation which has a peculiar interest in the continued existence of any valuable marine product, located in the high seas adjacent to its coasts or territorial waters, may adopt such measures as are essential to the preservation of the species, without limitation as to the distance from land at which such necessary measures may be enforced." This contention in its full scope was not admitted by the other parties to the controversy, but that such regulations were valid as against its own people, or that within its own jurisdiction they might be made effective against all comers, nobody denied. And as thus limited the principle has received the sanction of Russia, Great Britain, Japan, and the United States in the treaty recently concluded between those powers.

Articles V and VI of this treaty, which was ratified July 24, 1911, are as follows:

ARTICLE V.

Each of the High Contracting Parties agrees that it will not permit its citizens or

subjects or their vessels to kill, capture or pursue beyond the distance of three miles from the shore line of its territories sea otters in any part of the waters mentioned in Article I of this Convention.

ARTICLE VI.

Each of the High Contracting Parties agrees to enact and enforce such legislation as may be necessary to make effective the foregoing provisions with appropriate penalties for violations thereof.

What the Governments thus agree to do, each as to its own citizens, they could severally do without treaty. The purpose of the treaty was to secure community of action. It would not preserve the seals if the United States prohibited pelagic sealing by its own people, while such sealing was carried on by the people of the other nations.

The case of *La Ninfa* (75 Fed. Rep., 513), cited by appellant, is not at all in point. The act of Congress there construed forbade the killing of fur-bearing animals in Alaska and the waters thereof. The question presented was as to what were the waters of Alaska. The court held that under the treaty with Great Britain, proclaimed May 9, 1892 (27 Stat., 947), and the arbitration had in pursuance thereof, it was settled that the exclusive dominion of the United States did not extend beyond the ordinary limit of three miles, and that the statute by its terms did not apply beyond this limit.

The court said (pp. 518, 519):

> There is nothing in the award which denies jurisdiction of the United States over her own merchant vessels on the high seas at any place not within the jurisdiction of any other sovereignty. These questions have no bearing as to the interpretation to be given to the statutes under review. These statutes, whatever their interpretation may be, must be applied to citizens and subjects of all nations, and were not intended to apply only to citizens, subjects, and vessels of America. By the terms of the arbitration, "the rights of the citizens and subjects of either country" were involved in the decision of the arbitrators, and it necessarily follows that the citizens and subjects of the United States have the same right to rely upon the award as to their rights, under the statute, as the citizens and subjects of England. There are no provisions in the act of April 6, 1894, "to give effect to the award rendered by the tribunal of arbitration," which indicate any policy upon the part of this government to enforce any rights against its own citizens, under the statute, consistent with the contentions made, "from the beginning upon the important questions of its right to protect its property and seal fisheries." On the other hand, the entire act clearly shows that it is the policy of the government not to make any such distinction. The act was passed enacting certain rules relative to the control of its own sub-

jects in the exercise of the right which, under the award of the arbitrators, the two countries had in common to kill seal outside of the three-mile limit.

The contention of the appellant would make of the high seas a lawless realm, for it denies jurisdiction over them to all nations to any extent or for any purpose whatever. But in truth the law rules upon the sea as well as upon the land, each nation having jurisdiction over its own vessels and people and over all operations undertaken from its own shores.

There is no stretch of sovereignty in the act of Congress passed for the protection of the sponge fisheries of the Florida coast. It does no more than deny the use of the ports of the United States as bases of operations which are wasteful and destructive of those fisheries and thus injurious to the welfare of the people of the United States.

It is respectfully submitted that the judgment and decree of the District Court should be affirmed.

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OCTOBER, 1911.

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